(17)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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# No. 1118

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ELDON STEELE,

*Petitioner,*

*vs.*

THE STATE OF NORTH CAROLINA.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

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JULIUS C. SMITH,
THOMAS L. PARSONS,
GEORGE S. STEELE, JR.,
*Counsel for Petitioner.*

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ELDON STEELE,

*Petitioner,*

*vs.*

THE STATE OF NORTH CAROLINA.

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## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Eldon Steele, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina, a court of last resort, entered in the above cause on January 7, 1942 (reported below: In Re Steele, 220 N. C. 685, 18 S. E. (2d) 132), reversing the judgment of His Honor, Luther Hamilton, Judge, rendered at the April, 1941, Term of the Superior Court of Bladen County.

### Summary Statement of the Matter Involved.

On April 14, 1941, a warrant was issued by John H. Yates, a duly elected and qualified Justice of the Peace of Rockingham Township, Richmond County, North Carolina,

charging petitioner with the crime of public drunkenness and disorderly conduct (R. 6 & 7). On the same day, petitioner, then a young man eighteen years of age, appeared before the said magistrate and pleaded guilty to the charge contained in the warrant (R. 7). Petitioner was then sentenced to thirty days in the County Jail, to be assigned to work on the State Roads, in default of paying the Court Costs of eight dollars and thirty-five cents (R. 7). Two dollars of the Court Costs charged against petitioner was charged as a fee for the magistrate who tried the case (R. 8). Petitioner was duly committed to the County Jail and assigned to work on the Public Roads (R. 8). On April 28, 1941, after the time for appealing from the judgment of the magistrate had expired (N. C. C. S., Sec. 1530), while petitioner was in the custody of George Manning Bostic, superintendent of one of the North Carolina prison camps, and serving said sentence, he applied to the Honorable Luther Hamilton, one of the Judges of the Superior Courts of North Carolina, then holding a term of court in Bladen County, for a writ of *habeas corpus* (R. 9). Petitioner alleged in his petition for writ of *habeas corpus* that he was then in custody; that he had been deprived of his liberty without due process of law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and contrary to the law of the land, as guaranteed by Section 17 of Article I of the Constitution of North Carolina, in that the magistrate who tried him and received a fee for his conviction had a direct "and substantial pecuniary interest in the ultimate conviction of petitioner, because the said Yates would not have received any pay or compensation for his services in said trial except upon conviction of petitioner * * *"[1] (R. 10). The writ was granted (R. 11).

[1] The statutes setting the fees involved are Chapter 342 of North Carolina Public-Local Laws of 1933, as amended by Chapter 358 of North Carolina Public-Local Laws of 1935.

Upon return to the writ, His Honor found the facts and the law to be as alleged in the petition, and thereupon held that the proceedings and judgment in the trial of petitioner before John H. Yates, Justice of the Peace, "were unconstitutional and void, in *violation* of the *Fourteenth Amendment* to the *Constitution of the United States* and Section 17 of Article I of the Constitution of North Carolina in that they *deprived the defendant,* Eldon Steele, *of his liberty without due process of law* and contrary to the law of the land" (R. 13). Thereupon, His Honor ordered petitioner discharged from custody (R. 13).

Thereafter, the case was carried to the Supreme Court of North Carolina on writ of certiorari granted the twenty-fifth day of September, 1941 (R. 6) on petition therefor lodged in said court by the State, through its Attorney General, Harry McMullan (R. 2 to 6).

The case was heard upon the record, printed briefs and oral argument on the eighteenth day of November, 1941, (R. 19) and on the seventh day of January, 1942, the Supreme Court of North Carolina rendered its judgment reversing the judgment of the Superior Court (R. 18-19). Prior to the judgment of the Supreme Court of North Carolina, petitioner entered the armed forces of the United States and is now serving with the United States Army. For this reason, he has not been taken under capias issued in compliance with the judgment of the Supreme Court of North Carolina. This capias, however, remains a constant threat to his liberty.

## Jurisdiction.

1. The jurisdiction of this Court is invoked under the provisions of the United States Judicial Code, Section 237 (b), as amended February 13, 1925, 43 Stat. 936; U. S. C. A., Title 28, Sec. 344 (b).

2. The date of the judgment sought to be reviewed is January 7, 1942, on which date the Supreme Court of the State of North Carolina, the highest court of that State in which a decision could be had where any right, title, privilege or immunity is specially set up or claimed under the Constitution of the United States, rendered a final decision reversing the judgment of the Superior Court of Bladen County which discharged petitioner on return to a writ of *habeas corpus* (R. 18-19). The opinion of the Supreme Court of North Carolina is reported as In Re Steele, 220 N. C. 685, 18 S. E. (2d) 132.

3. In his petition for writ of *habeas corpus,* petitioner herein founded his whole claim to discharge from custody on the two grounds that the proceedings and judgment before the Justice of the Peace were in violation of both the Federal and State Constitutions (R. 10). The Federal question raised was whether petitioner had been deprived of due process of law as guaranteed by the Fourteenth Amendment by being subjected to trial on a criminal charge before an inferior judicial tribunal the judge of which had a direct and substantial pecuniary interest in rendering a judgment against him (R. 10). This question was distinctly raised in the original petition for writ of *habeas corpus* and was determined favorably for petitioner by the Superior Court upon the grounds that "Justices of the Peace in Richmond County [where petitioner was tried] are allowed to tax $2.00 to the costs in criminal actions as fees for the Justices of the Peace trying such actions, said costs to be paid by the defendants if they be found guilty; and that * * * if the defendants be sentenced to the roads or the County Jail for non-payment of the costs, the County is liable to pay half of said fees * * * and that there is no provision under the laws of North Carolina for

the payment of fees * * * if the defendant be acquitted" (R. 12 & 13).

This same question was urged in the printed briefs and in the oral arguments before the Supreme Court of North Carolina and was determined against petitioner (R. 14-19), the Court holding that "the prisoner was lawfully in custody. The writ of *habeas corpus* should have been dismissed" (R. 18).

That this Court may, by *certiorari,* require that there be certified to it for review and determination any cause wherein a final judgment has been rendered by the highest court of a State where any right, privilege or immunity is specially set up and claimed by a party thereto under the Constitution of the United States, and that the instant case, wherein petitioner claims to have been deprived of his rights, privileges and immunities under the due process clause of the Fourteenth Amendment, falls within this general rule, is sustained by the following cases: *Smith* v. *O'Grady,* 312 U. S. 329, *Herndon* v. *Lowry,* 301 U. S. 242, and *Powell* v. *Alabama,* 287 U. S. 45.

This petition was filed the sixth day of April, 1942.

**Questions Presented.**

1. Whether a trial before an inferior tribunal, without a jury and before a judge whose entire compensation depends upon a conviction of accused, deprives accused of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States?

2. Whether the *right,* upon the deposit of three dollars by accused, of a trial by a jury of six men in such tribunal, who are presided over by such disqualified officer, would meet the requirements of due process of law?

3. Whether the *right* to appeal to a higher court where there is afforded a trial *de novo* before an impartial judge

and jury, though not exercised by accused, meets the requirements of due process of law?

4. Whether a plea of guilty, without an express waiver, would confer upon such judge the right to proceed with the trial and enter a valid judgment?

5. Whether an accused, who has been sentenced to prison by such disqualified officer, may avail himself of a writ of *habeas corpus* to secure his release from such imprisonment after the time allowed for appealing has expired?

**Reasons Relied Upon for Allowance of the Writ.**

1. The Supreme Court of the State of North Carolina held that an accused, even though without counsel, is charged with full knowledge of the existence of the disqualification of a judge because of pecuniary interest, and that his mere failure to object to a trial by such a disqualified judge constitutes a waiver by him of the disqualification. (220 N. C. 689, 18 S. E. (2d) 135, R. 18). The decision in this Court in the case of *Patton* v. *United States*, 281 U. S. 276, held that the waiver of any constitutional right of an accused must be both an intelligent and a competent waiver and that such fact should be clearly determined by the trial court; and, further, that it would be fitting and appropriate for that determination to appear upon the record. The decision of this Court in Ex Parte *Bain*, 121 U. S. 1, held that a party cannot waive a constitutional right when the effect of such waiver is to give a court jurisdiction. The decision of the State court is probably in conflict with those applicable decisions of this Court.

The Supreme Court of North Carolina held that the mere right to appeal from the judgment of a judge disqualified because of pecuniary interest, even though not exercised by accused, afforded him due process of law (220 N. C. 688,

18 S. E. (2d) 135, R. 17); and this was held, even though at the time of the application for writ of *habeas corpus* in the instant case, the time allowed by law (N. C. C. S., Sec. 1530) for taking such appeal had expired (R. 8 & 9). The decision of this court in *Johnston* v. *Zerbst*, 304 U. S. 458, held that where an accused had been deprived of a constitutional right in the trial court, the right of appeal not exercised by accused did not remedy the defect. The decision of the state court is probably in conflict with that applicable decision of this court.

The Supreme Court of North Carolina held that the judgment of a judge who is disqualified because of pecuniary interest is merely erroneous and can not be collaterally attacked by writ of *habeas corpus* (220 N. C. 689, 18 S. E. (2d) 135, R. 18). The decision of this court in *Hans Nielsen, Petitioner*, 131 U. S. 176, held that where accused has been deprived of the benefit of a constitutional provision securing to him a fundamental right, this is not a mere error in law but justifies a discharge of accused in a *habeas corpus* proceeding. See also *Mooney* v. *Holohan*, 294 U. S. 103, 112, *Johnson* v. *Zerbst*, *supra*, and *Smith* v. *O'Grady*, *supra*. The decision of the state court is probably in conflict with those applicable decisions of this court.

The Supreme Court of North Carolina held that the right to a trial before a fair and impartial tribunal, within the meaning of the due process of law clause of the Fourteenth Amendment, is a personal privilege, and that that constitutional provision is for the benefit of accused *only* and is not founded in public policy (220 N. C. 689, 18 S. E. (2d) 135, (R. 18). This court has not, as yet, decided this point. The case involves a decision on an important and fundamental question of construction of the Fourteenth Amendment.

The Supreme Court of North Carolina held that, where an accused is arraigned for trial before a judge who has a

direct, substantial pecuniary interest in finding him guilty, the failure of accused to object immediately to such disqualification, his subsequent plea of guilty, and his right to appeal to a higher court for a trial *de novo*, were sufficient safeguards against the procedure condemned in the case of *Tumey* v. *Ohio*, 273 U. S. 210 (220 N. C. 688, 689, 18 S. E. (2d) 135, R. 17). The Tumey Case held that a judge with such interest was without jurisdiction to render a judgment against an accused. The decision of the state court is probably in conflict with that applicable decision of this court.

In support of the foregoing petition, your petitioner submits a brief which is attached hereto.

For the reasons heretofore stated, it is respectfully submitted that this petition should be granted.

JULIUS C. SMITH,
THOMAS L. PARSONS,
GEORGE S. STEELE, JR.,
*Counsel for Petitioner.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1941**

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# No. 1118

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ELDON STEELE,

*Petitioner,*

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THE STATE OF NORTH CAROLINA.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

### Jurisdiction.

The decision sought to be reviewed by this petition is that of the Supreme Court of the State of North Carolina, which is the highest court in said state, and is reported as In Re Eldon Steele, 220 N. C. 685, 18 S. E. (2d) 132.

There were only two questions presented to the court below for decision, and these questions, substantially similar, were whether or not petitioner had been deprived of his liberty without "due process of law," as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and "contrary to the law of the land," as guaranteed by Article I, Section 17, of the Constitution of North Carolina (R. 10). The North Carolina Supreme

Court has held that these two terms are synonymous and interchangeable. *Parish* v. *East Coast Cedar Co.*, 133 N. C. 478, 483. Since the court below held that petitioner was lawfully in custody, it must necessarily have decided that no right guaranteed under the Fourteenth Amendment had been denied petitioner. Further, the Superior Court, to which application for the writ of *habeas corpus* was made, expressly held that the trial of petitioner was "unconstitutional and void, in violation of the Fourteenth Amendment to the Constitution of the United States" and that the trial and proceedings had thereunder "deprived the defendant, Eldon Steele, of his liberty without due process of law" (R. 13), and entered judgment discharging petitioner from custody (R. 13). The state Supreme Court reversed the judgment of the Superior Court (R. 18).

## ARGUMENT.

### I.

**The fact that petitioner was subjected to the judgment of a court the judge of which had a direct, personal, substantial, pecuniary interest in finding him guilty, or in having him plead guilty, deprived petitioner of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.**

It is an ancient maxim of law that no man ought to be the judge in his own cause, and this principle, a cornerstone of modern jurisprudence, finds expression in many of the State constitutions as well as in the Fourteenth Amendment. The leading case on this particular point is *Tumey* v. *Ohio*, 273 U. S. 510. The opinion was delivered by Chief Justice Taft, who laid down this clear rule of law:

> "But it certainly violates the Fourteenth Amendment, and deprives the defendant in a criminal case of due process of law, to subject his liberty or property

> to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 273 U. S. 523.

As pointed out in the opinion of the court below (R. 17), the facts in the instant case are different from those in the *Tumey* case in that petitioner in the instant case did not make formal objection to the disqualification of the judge who tried him; he had a right to a trial by a jury of six men, provided he first deposited with the trial judge the sum of $3.00 for jury fees; and he had a right to appeal to the Superior Court where he would be afforded a trial *de novo* before an impartial judge and jury. It is earnestly contended and respectfully submitted that to allow any of these facts to take the instant case out of the doctrine announced in the *Tumey* case would be to destroy completely the value of that doctrine.

> "Every procedure which would offer a *possible* temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." (Italics supplied.) *Tumey* v. *Ohio*, supra.

Both the State and Federal courts are in conflict as to the meaning and application of the *Tumey* case. In 1927, soon after that case was decided by this Court, the Federal judges of the Eastern and Western Districts of Kentucky reached diametrically opposite conclusions as to its application to procedure under Kentucky law. In Ex Parte *Meeks*, 20 F. (2d) 543, (W. D. Ky.) the court held that petitioner was not entitled to a writ of *habeas corpus* when he sought it on the ground that the trial judge was disqualified to try him because of pecuniary interest in reach-

ing a conclusion against him. In Ex Parte *Baer*, 20 F. (2d) 912 (E. D. Ky.), under substantially similar facts, the court discharged the petitioner from custody upon return of the writ. In Ex Parte *Hatem*, Sixth Circuit Court of Appeals, 38 F. (2d) 226, the court held that petitioner who had been convicted by a judge who was disqualified by reason of pecuniary interest was entitled to discharge upon return of the writ, even though the judge had waived his right to fees in the trial of petitioner.

The State courts tend more to attempt to evade the doctrine of the *Tumey* case by seizing upon some inconsequential difference in facts to take the case at hand out of the doctrine. Generally speaking, the following cases seem to hold that the right to a trial *de novo* upon appeal, when exercised by the defendant, amply protects the rights of the accused and affords him due process of law, even though he has been theretofore tried by a disqualified judge, and though the jurisdiction upon appeal is purely derivative:

*Hill* v. *State*, 174 Ark. 886, 298 S. W. 321;
*Hitt* v. *State*, 149 Miss. 718, 115 So. 879;
*State* v. *Gonzales*, 43 N. M. 498, 95 P. (2d) 673;
*Brooks* v. *Potomac*, 149 Va. 427, 141 S. E. 249.

Two other State court decisions, however, hold that the right of trial *de novo* on appeal does not afford due process where the judge of the inferior tribunal is disqualified because of pecuniary interest. *Williams* v. *Brannen*, 116 W. Va. 1, 178 S. E. 67; Ex Parte *Kelly*, — Tex. Cr. —, 108 S. W. (2d) 728.

Another State court decision, *State* v. *Shelton*, 205 Ind. 416, 186 N. E. 772, holds that a fee of $1.50, dependent upon conviction, is so small as to bring the case within the maxim *de minimis non curat lex*, one of the recognized exceptions to the rule laid down in the *Tumey* case. Ex Parte *Kelly*, *supra*, however, holds that a similar fee of $3.85 does not

come within the aforesaid maxim, and that the *Tumey* case is applicable.

That a conflict exists between the holdings in the cases of *Tari* v. *State,* 117 Ohio St. 481, 158 N. E. 594, 57 A. L. R. 284, (which was relied upon by the Supreme Court of North Carolina in the instant case), and *Tumey* v. *Ohio, supra,* is recognized by the opinion in the case of *Re Von Uehn,* 27 Ohio NPNS 167.

The *Tari* case, which was a four to three decision of the Ohio Supreme Court decided subsequent to the *Tumey* case, rests upon the express holding that a judgment rendered by a judge who is disqualified to try a criminal case by reason of pecuniary interest, is merely voidable and not void, and is in direct conflict with the later decision and opinion of this Court in *Brown* v. *Mississippi,* 297 U. S. 278. The Ohio court made no distinction between disqualification of judges because of pecuniary interest and disqualification for other cause. This distinction is clearly recognized by Chief Justice Taft in the *Tumey* case at page 523 as follows:

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters of legislative discretion."

And the holding of this court in the Brown Case was to the effect that a deprivation of due process in the trial court rendered the judgment void.

II.

**The mere fact that an accused, who appears before a tribunal the judge of which is disqualified to proceed in the matter because of pecuniary interest, has the right to be tried by a jury of six, upon the deposit by him with the judge of the sum of $3.00 as jurors' fees, does not afford accused due process of law.**

If petitioner had so desired, he could have demanded a trial by a jury of six jurors under Section 1501 of the Consolidated Statutes of North Carolina, but, under the provisions of Section 1506 of said Consolidated Statutes, it would be necessary for him to deposit the sum of three dollars with the said judge before he would even be entitled to a jury trial.

> "Counsel would avoid the maxim [that no man may be a judge in his own case] on the grounds that the accused may have a jury, instead of the magistrate to try him, and that the accused has the unrestricted right of appeal. Both of these grounds are unsubstantial. 'Trial by jury', in the constitutional sense, requires such a trial to be under the superintendence of a disinterested judge. Capital Traction Co. *v.* Hof, 174 U. S. 1, 13, 14, 19 S. Ct. 580, 43 L. Ed. 873." *Williams* v. *Brannen,* supra.

The decision of the Supreme Court of North Carolina on this phase of the instant case, though somewhat uncertain, is very probably in conflict with the applicable decisions of this court as well as the holdings in other state jurisdictions.

III.

**The fact that petitioner had the right of appeal from the disqualified judge to the Superior Court, where he would be afforded a trial de novo before an impartial judge and jury, did not afford petitioner due process of law.**

> "It is ordinarily cheaper to pay a moderate fine than to pay the expenses attendant upon appeal; for which reason many an innocent man has submitted to an unjust decision in an inferior court. Right of appeal does not meet the situation. The Constitution requires that the accused shall be tried before a fair and impartial tribunal in the first instance where he will not face the alternative of paying an unjust fine or of resorting to the delay, annoyance, and expense of an appeal."
> *Williams* v. *Brannen,* supra.

It seems that the decision of the Supreme Court of North Carolina is entirely based upon the assumption and holding (R. 17) that "even if the disqualification of the trial justice be conceded, by the clear weight of authority the effect would be to render his judgment voidable, and not void." Otherwise, the questions of waiver, estoppel and the right of appeal would not even be raised, for a void judgment, by every authority, may be disregarded entirely, or collaterally attacked, and no appeal therefrom is necessary. *Tari* v. *State,* supra; *Johnson* v. *Zerbst,* 304 U. S. 458. In the instant case, there is the additional fact that the time allowed by law for appeal and trial *de novo* (N. C. C. S., Sec. 1530) had expired (R. 8 & 9). This additional fact was also present in *Johnson* v. *Zerbst,* supra, and the court held that the denial by the trial court of constitutional rights deprives the trial court of jurisdiction.

In *Ex Parte Kelly,* supra, the petitioner had had the right to appeal to the County Court for a trial *de novo,* and it was held that this right did not prevent the trial by a

magistrate who was paid a fee for his services only upon conviction from being "at variance with constitutional guaranties."

The decision of the Supreme Court of North Carolina is in conflict with all of the above cited cases except the Tari Case, which it is submitted, is itself in conflict with the decisions of this court in the Tumey Case and in *Johnson* v. *Zerbst*, supra.

IV.

**Where a trial judge is disqualified because of pecuniary interest, his judgment and the proceedings before him are null and void, and the offer of an accused to plead guilty to the charge against him does not remove the disqualification or confer jurisdiction upon said court to proceed with the trial.**

That the judgment of, and the proceedings before, a judge who is disqualified because of pecuniary interest are null and void has been either expressly or inferentially held in the following cases:

*Hans Nielsen, Petitioner*, 131 U. S. 176.
*Tumey* v. *Ohio*, supra.
*Johnson* v. *Zerbst*, supra.
*Powell* v. *Alabama*, 287 U. S. 45.

It is quite obvious that a judge who is interested in finding the accused guilty is even more interested in having him plead guilty, if he could thereby vest himself with jurisdiction which he would not otherwise have; and if the judge had no jurisdiction and his judgment is constitutionally invalid, jurisdiction may not be conferred upon him by any act of the accused, even a plea of guilty. This is the express holding of *Re Von Uchn*, supra. To hold that the judge is disqualified from trying a defendant who pleads "not guilty" but may pass judgment upon one who

pleads "guilty," would be to place a premium upon an effort by the judge to get the accused to enter a plea of guilty, or to misinterpret a "not guilty" plea entered by the accused, regardless of whether or not accused is guilty.

This precise question, so far as we have been able to determine from the reported cases, has not been decided by any court except the Ohio intermediate court in the case cited in the preceding paragraph, and the Supreme Court of North Carolina in the instant case. These two decisions upon a question of interpretation of the due process clause of the Fourteenth Amendment are in direct conflict, and the matter should be finally determined by this court.

V.

**Where there is a want of due process in the trial and proceedings upon which sentence of imprisonment is based, the accused may attack the judgment and sentence collaterally and secure his release from imprisonment by writ of habeas corpus.**

> "It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the *proceedings* or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on *habeas corpus*. This was so decided in the cases of *Ex Parte Lange*, 18 Wall. 163, and *Ex Parte Siebold*, 100 U. S. 371, and in several other cases referred to therein." (Italics for "proceedings" supplied.) *Hans Nielsen, Petitioner*, supra.

This holding was reiterated by this court in the following cases:

*Brown* v. *Mississippi*, supra.

*Johnson* v. *Zerbst*, supra.

*Smith* v. *O'Grady*, 312 U. S. 329.
*Mooney* v. *Holohan*, 294 U. S. 103.
*Moore* v. *Dempsey*, 261 U. S. 86.

The decision of the Supreme Court of North Carolina in the instant case held that a judgment of a judge disqualified because of pecuniary interest is merely voidable and not void, and is not subject to attack by habeas corpus (R. 17).

**Conclusion.**

"We have here a challenge to a part of the judicial system of the state" (R. 15). Thus the importance of the instant case to the people of North Carolina was indicated by the Supreme Court of North Carolina in the opinion rendered below. It is equally of vital importance to the people of all the states whose courts of last resort have failed or refused to follow the Tumey Case. The cases heretofore cited have tended to show that, besides North Carolina, the courts of the states of Arkansas, Indiana, Mississippi, New Mexico and Virginia have either failed to follow, or have misinterpreted the doctrine announced by this court in the Tumey Case. *Hill* v. *State*, supra; *State* v. *Shelton*, supra; *Hitt* v. *State*, supra; *State* v. *Gonzales*, supra; and *Brooks* v. *Potomac*, supra.

> "It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community * * * After securing wisdom and impartiality in their judgment, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind." *Oakley* v. *Aspinwall*, 3 N. Y. 547.

There is probably no single factor which has contributed so largely toward the lowering of the respect and confidence of the general public of the State of North Carolina in our system of jurisprudence than the procedure which now prevails in this state in the trial of criminal cases before Justices of the Peace. The gross injustice and unfairness of trials of petty criminal offences in these so-called courts is almost entirely attributable to the vicious fee system which is allowed to exist.

It is apparent that the guidance and assistance of this court must be obtained in order that the petitioner and the people of the State of North Carolina may have the word of the highest judicial authority of the land upon the question of the rights, privileges and immunities guaranteed by the Fourteenth Amendment.

Respectfully submitted,

JULIUS C. SMITH,
THOMAS L. PARSONS,
GEORGE S. STEELE, JR.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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ELDON STEELE,
*Petitioner,*

*vs.*

THE STATE OF NORTH CAROLINA,
*Respondent.*

---

## No. 1118

---

**BRIEF OF THE STATE OF NORTH CAROLINA RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI**

---

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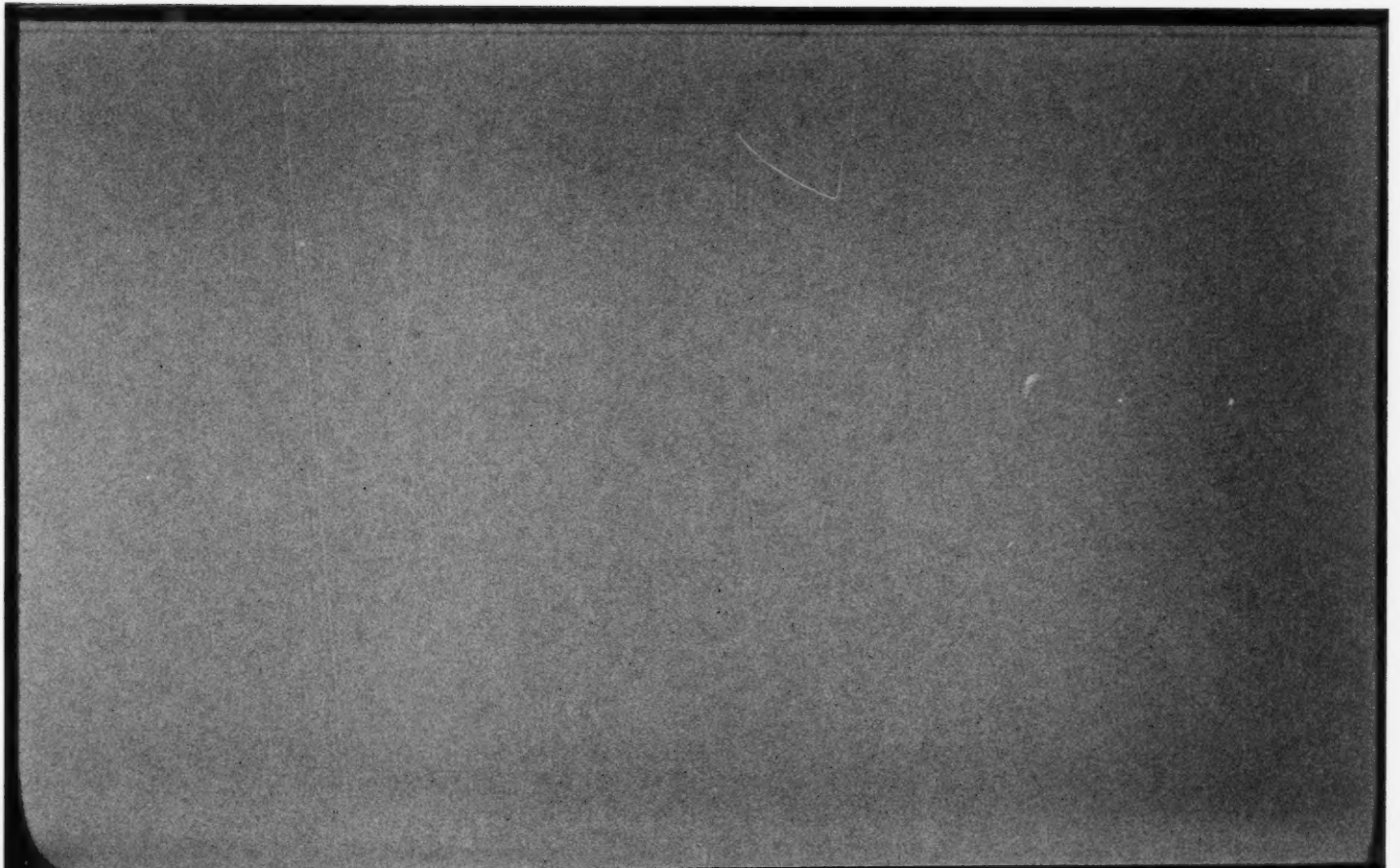
*Counsel for State of North Carolina, Respondent.*



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**BRIEF OF THE STATE OF NORTH CAROLINA RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI**

---

**Statement Of The Case**

The petitioner, Eldon Steele, seeks by writ of *certiorari* to have this Court review the decision of the Supreme Court of North Carolina reversing a judgment rendered in the Superior Court of Bladen County, North Carolina, discharging the petitioner on writ of *habeas corpus*, he being then in prison serving a term for public drunkenness and disorderly conduct. The decision of the Supreme Court of North Carolina is reported as IN THE MATTER OF ELDON STEELE, 220 N. C. 445, and was filed January 7, 1942.

**Facts**

The petitioner, Eldon Steele, after having pleaded guilty (R. 7) to a charge of public drunkenness and disorderly conduct before John H. Yates, a justice of the peace in Richmond County, North Carolina, was sentenced by the said justice of the peace to a term of thirty days on the roads, suspended upon payment of the costs, amounting to $8.35. (R. 7). The petitioner failing to pay the costs, it was ordered that the sentence be placed into effect on April 14, 1941. (R. 7 and 8).

The petitioner was assigned to work the roads under the State Highway and Public Works Commission, as provided by law, and was taken into custody for this purpose by the Commission. Before the expiration of his sentence, the petitioner filed with His Honor, Luther Hamilton, a Judge of the Superior Court, a petition for writ of *habeas corpus*. (R. 9). The writ was issued by Judge Hamilton (R. 11), and, in consequence of proceedings before him, an order or judgment was rendered at the April Term, 1941, of the Superior Court of Bladen County, North Carolina, discharging the petitioner. (R. 12 and 13).

The reasons assigned for the discharge of the petitioner were that the proceedings and judgment in Richmond County before John H. Yates, Justice of the Peace, were unconstitutional and void, the Court being of the opinion that the said justice of the peace was disqualified by reason of his interest in the fees which would accrue to him in the event of a conviction and that the judgment rendered under the circumstances was violative of the due process clause or the Fourteenth Amendment to the Constitution of the United States and Article I, Section 17, of the Constitution of North Carolina, which provides that no person ought to be deprived of his liberty but by the law of the land.

Costs in criminal proceedings before justices of the peace in Richmond County, North Carolina, are regulated by North Carolina Public-Local Laws of 1933, Chapter 342, as amended by North Carolina Public-Local Laws of 1935, Chapter 358. Provision is made for a fee of two dollars to be taxed against

a defendant for the benefit of the justice of the peace when there is a conviction. If the defendant is imprisoned for nonpayment of costs, the county is required to pay one-half the fees provided in the statute. However, no provision is made for compensation of justices of the peace in case a defendant is acquitted.

On June 9, 1941, Harry McMullan, Attorney General of the State of North Carolina, filed with the Supreme Court of North Carolina a petition for writ of *certiorari* to have the judgment, order, and other proceedings in the case of STATE v. ELDON STEELE removed to the Supreme Court of North Carolina in order that the judgment or order discharging and releasing the prisoner might be reviewed. (R. 2). The petition for writ of *certiorari* was allowed September 25, 1941. (R. 6). In an opinion filed January 7, 1942, the Supreme Court of North Carolina held that the petitioner had been lawfully imprisoned and reversed the judgment of the Superior Court discharging him upon writ of *habeas corpus*. (R. 14).

## Argument

The State of North Carolina contends that the writ of *certiorari* ought not to be allowed. By seeking a writ of *certiorari*, the petitioner appeals to the discretion of the Supreme Court, but the Court in its discretion does not review decisions of state courts unless substantial federal questions are presented on the record and must necessarily be decided in disposing of the case. The constitutional questions which the petitioner seeks to have determined in this Court are abstract questions not presented by the record, and his claim that the decision of the Supreme Court of North Carolina deprived him of his liberty without due process of law is palpably unfounded. Under the circumstances it is not appropriate to grant a writ of *certiorari*.

### I

### THE CONSTITUTIONALITY OF THE PROCEDURE FOR DETERMINING THE GUILT OR INNOCENCE OF DEFENDANTS IN COURTS OF JUSTICES OF THE PEACE IN RICHMOND COUNTY IS A MOOT QUESTION, THE PETITIONER HAVING PLEADED GUILTY.

A fact of greatest importance in considering this petition is that the petitioner pleaded guilty (R. 7) to the charge against him in the court of John H. Yates, Justice of the Peace, in Richmond County, North Carolina.

The burden of his petition is that proceedings in the magistrate's court deprived him of his liberty without due process of law, that the justice of the peace was disqualified because of pecuniary interest in fees which accrued to him in case of conviction, that because of his disqualification his judgment was void under the Constitution of the United States, and, therefore, that the decision of the Supreme Court of North Carolina ought to be reversed.

The petitioner asserts that, inasmuch as the statute regulating fees of justices of the peace in Richmond County,

North Carolina, (North Carolina Public-Local Laws of 1933, Chapter 342, as amended by North Carolina Public-Local Laws of 1935, Chapter 358) affords compensation to the justices in criminal cases only when defendants are convicted, such justices are tempted to forget the burden of proof required to convict a defendant. Whatever the effect of the alleged pecuniary interest of the justice of the peace may be in a case in which the resulting bias of the justice can affect his judgment, this system of compensation presents no constitutional question when he is not called upon to decide questions of fact.

The petitioner by pleading guilty to a charge of public drunkenness and disorderly conduct confessed his guilt in open court and waived the benefit of every statutory and constitutional safeguard designed to insure an impartial judicial determination of his guilt or innocence. In effect, he was not convicted by the justice of the peace; he convicted himself. The alleged disqualification of the justice of the peace is a disqualification which is operative only when his alleged pecuniary interest may affect his official action. When the petitioner pleaded guilty, the only action required of the justice was the rendition of judgment. No judgment he might have pronounced could have possibly affected his right to the compensation or the amount of such compensation.

The facts of this record being such that the fee system of which petitioner complains could not have influenced the judgment, no constitutional question is presented. Questions as to the constitutionality of procedure before justices of the peace when a defendant pleads not guilty and issues of fact must be determined are purely abstract and hypothetical, and are not presented by this petition.

It is not the function of this Court to decide moot questions.

*Lord v. Veazie*, 8 How. 251, 12 L. ed. 1067;

*Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620, 33 L. ed. 1016;

*Castillo v. McConnico*, 168 U. S. 674, 18 Sup. Ct. 229, 42

L. ed. 622;

*McCain v. Des Moines*, 174 U. S. 158, 19 Sup. Ct. 639, 43 L. ed. 932;

*Muskrat v. United States*, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246.

Nor will constitutional questions be decided when not presented by the record and it is not necessary for the disposition of the case.

*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773;

*Baker v. Grice*, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. ed. 748;

*Arkansas Louisiana Gas Co. v. Department of Public Utilities*, 304 U. S. 61, 58 Sup. Ct. 770, 82 L. ed. 1149.

## II

## THE ATTACK ON THE CONSTITUTIONALITY OF CRIMINAL PROCEEDINGS BEFORE JUSTICES OF THE PEACE IN RICHMOND COUNTY WOULD BE PALPABLY UNFOUNDED, EVEN IF THE CONSTITUTIONAL QUESTIONS AROSE UPON THIS RECORD.

Even if the petitioner had pleaded not guilty, so that constitutional objections to the fee system of compensating justices of the peace in Richmond County, North Carolina, could arise upon this record, these constitutional objections would be palpably unfounded and not sufficient to justify review of the decision of the North Carolina Supreme Court by this Court.

The contention that a trial for a minor criminal offense before a justice of the peace in Richmond County, North Carolina, denies due process of law is based upon the case of *Tumey v. Ohio*, 273 U. S. 210, 47 Sup. Ct. 437, 67 L. ed. 969. In that case it was held that an Ohio mayor, because of his pecuniary interest in fees which were dependent upon conviction, was disqualified to try criminal cases, that a trial before him was violative of the Fourteenth Amendment, and that a sentence imposed by him was void. However, criminal

procedure before justices of the peace in Richmond County and elsewhere in North Carolina may be readily distinguished from the type of procedure condemned in the *Tumey* Case.

The amount of the fee received by the mayor in the *Tumey* Case in the event of conviction was much larger than that received by a justice of the peace in Richmond County, North Carolina. The mayor personally received $12.00, and one-half of any fine imposed was paid into the treasury of the city of which he was an officer. Under Public-Local Laws of 1933, Chapter 342, a justice's fee in Richmond County is only $2.00.

In the opinion in the *Tumey* Case, it is recognized that a system in which an inferior court judge is paid for his services only when he convicts does not violate the requirement of due process of law if "the costs usually imposed are so small that they may be properly ignored as within the maxim de minimis non curat lex." 273 U. S. 510, 531. The fee of $2.00 in Richmond County is so small in comparison to the fee involved in the *Tumey* Case that it may well come within the *de minimis* rule.

An important element which influenced the Court in the *Tumey* Case was the fact that one-half the fine assessed against a convicted defendant was to be paid into the municipal treasury. The mayor, as the chief officer of the municipality, had both a personal and official interest in building up the treasury. No such influence is operative in Richmond County, for under Article IX, Section 5, of the North Carolina Constitution the clear proceeds of all fines must be paid into the county school fund.

In the *Tumey* Case the accused had no right to a trial by jury before the mayor. In North Carolina, however, a trial by jury before a justice of the peace is available if requested. *N. C. Code Ann.* (Michie, 1939), Sec. 4627. A defendant is privileged also to have the case removed to another justice if dissatisfied with the one first assuming jurisdiction. *N. C. Code Ann.* (Michie, 1939), Sec. 1498.

The foregoing differences between procedure before a

justice of the peace in Richmond County and procedure before the Ohio mayor are important. However, the most important difference and the one which makes the authority of *Tumey v. Ohio* entirely irrelevant and uncontrolling in the instant case is the difference in the nature of the appeal allowed by law from the decision of the two officers. In the *Tumey* Case the mayor's decision on questions of fact was final. There was no appeal except upon matters of law and legal inference. However, in North Carolina, a defendant convicted of a criminal offense before a justice of the peace may appeal to the Superior Court, where he is entitled to a trial *de novo* on questions of fact and law. *N. C. Code Ann.* (Michie, 1939), Sec. 4647. This is a right guaranteed by Article IV, Section 27, of the North Carolina Constitution.

The validity of a system of criminal procedure should be determined by considering the system as a whole. The fact that there is a possibility of abuse at some particular stage of the procedure should not invalidate the whole and render void a criminal judgment if an efficient and practical method of correction is afforded subsequently. If it be conceded that the fee system in North Carolina tends to prevent some justices of the peace from being impartial in criminal cases, nevertheless, the right of appeal and trial *de novo* in the superior court is a complete and sufficient safeguard against injustices which may occasionally arise. If by utilizing the system of criminal procedure as a whole and invoking all of the remedies provided by law for his protection a defendant may obtain a fair and impartial determination of the issue of his guilt or innocence, the requirements of due process and the law of the land are satisfied. That is the doctrine of the United States Supreme Court, for in *Frank v. Mangum*, 237 U. S. 309, 328, 35 Sup. Ct. 582, 587, 59 L. ed. 969, 980, Justice Pitney, speaking of the due process clause, says:

> "The prohibition is addressed to the State; if it be violated, it makes no difference in a court of the United States by what agency of the state this is done; so, if a violation be threatened by one agency of the state, but

prevented by another agency of higher authority, there is no violation by the state."

Although the United States Supreme Court and the Supreme Court of North Carolina have not directly passed upon the question, it has been quite generally held by other tribunals that the right to a trial *de novo* on appeal eliminates possible constitutional objections to trials before magistrates where fees are dependent upon conviction.

In *Ex Parte Meeks*, 20 F. (2d) 543 (W. D. Ky.), the petitioner had been convicted of violating the state prohibition law before a county court judge in Kentucky. His sentence included the payment of a $100 fine and a term in prison. The petitioner asked to be released on writ of *habeas corpus* on the grounds that the trial judge had a pecuniary interest in the case, being entitled to ten per cent of the fine, that the proceedings violated due process, and under *Tumey v. Ohio* the sentence was void. The court denied the relief requested on the ground that, inasmuch as the petitioner could under Kentucky law appeal and be tried *de novo* in a court where no such pecuniary interest would exist, the procedure in the state courts afforded due process of law, and *Tumey v. Ohio* was distinguishable. The Court said, at page 544:

"As was pointed out by the Supreme Court in the case of *Frank v. Mangum*, 237 U. S. 309, 35 S. Ct. 582, 59 L. ed. 969, the question involved, when it is sought by habeas corpus proceedings to release the petitioner from confinement under a judgment of the state court, is whether he has been denied due process of law by the state, and that is determined, not merely by the result in one judicial tribunal of the state, but the whole procedure open to him under the state law must be examined, for the purpose of determining if the state law has furnished the means by which the wrong done in one tribunal may be corrected in another."

In *Hill v. State*, 174 Ark. 886, 298 S. W. 321, the defendant had been convicted in a mayor's court before a jury, of assault and battery. He appealed to the circuit court, where

he was again convicted after a trial *de novo*. Appealing to the Supreme Court, his contention was that his conviction should not stand, for under the due process clause the mayor's court in which the proceedings began was without jurisdiction, the mayor, officers of the court, and the jury being interested in the outcome on account of the fee system. The conviction was affirmed on the ground that the provision for trial *de novo* in the circuit court satisfied the requirements of due process, the court observing that:

> "The appellant contends that the mayor had no jurisdiction on the ground that he and the jury and the officers had a pecuniary interest in convicting the defendant. To sustain this contention, appellant relies upon the decision of the United States Supreme Court in the case of *Tumey v. Ohio*, 47 S. Ct. 437, 71 L. ed. 749. This case has no application to the facts of this record, for the reason that the statutes of Ohio, which were reviewed by the Supreme Court of the United States, are entirely different from the statutes of our own state. The statutes of Ohio under consideration by the Supreme Court of the United States did not grant the defendant convicted before the mayor's court the right of appeal to a higher court where a trial *de novo* was to be had in the higher court."

In *State v. Schelton*, 205 Ind. 416, 186 N. E. 772, it was held that the procedure before justices of the peace in Indiana did not on account of the fee system deny due process to a criminal defendant. Summarizing the provisions designed for the protection of a defendant, the Court said:

> "The law of Indiana as applicable to a trial before a justice of the peace provides for a change of venue (Section 2100, Burns' 1926) from the justice of the peace and also from the township. It also gives the defendant a right to trial by jury. The fees are small and not sufficient to justify the fear that the justice of the peace would be influenced to convict in order to receive his fees. And if the defendant entertains such fears he has the right to

call for a jury, and also to a change of venue from the justice. He is safeguarded on every hand. If convicted either by the justice or jury, he has the right to an appeal to the circuit court and there try his case *de novo* either before the judge or jury."

It was concluded that the procedure before justices of the peace in Indiana was distinguishable from the procedure condemned in *Tumey v. Ohio.* The *Schelton* Case was followed in *Cole v. Wherly,* 206 Ind. 461, 190 N. E. 56, and *Harding v. Minos,* 206 Ind. 661, 190 N. E. 862.

The defendant in *Hitt v. State,* 149 Miss. 718, 115 So. 879, was convicted in the court of a justice of the peace in Mississippi of a violation of the prohibition laws. He appealed to the circuit court and thence to the supreme court, insisting that the trial in the justice's court was a denial of due process since the justice received no fees for acquittals and, therefore, his motion to quash the affidavit upon which he was tried should have been allowed. The court held that the conviction was valid. It was of the opinion that an allowance of $60 per year in lieu of fees in cases in which defendants were acquitted kept justices of the peace from having a pecuniary interest in criminal cases, although they did receive fees in case of conviction. However, the court held that, even if it were conceded that the procedure in the justice's court would be objectionable if there were no provision for appeal, the fact that the defendant has a right upon appeal to a trial *de novo* saved the system from constitutional objections.

Similarly, in *State v. Gonzales,* 43 N. M. 498, 95 P. (2d) 673, the right to a trial *de novo* on appeal was held to preserve the constitutionality of criminal proceedings before a justice of the peace who was paid fees only in the event of conviction. The Court said:

"If we gave no further latitude to appellant's claim of error than he does himself, viz: a denial of due process under the federal constitution, U. S. C. A. Const. Amend. 14, it would be a sufficient answer to say that whatever

> the fact in regard to pecuniary interest of the justice of the peace in his costs, the appellant thereafter had a trial *de novo* before a District Judge free from this interest. This would meet the requirements of due process. In other words, the federal constitution does not afford a guaranty of due process twice in the same case any more than our constitution guarantees to [two] jury trials in the same case."

In *Ex Parte Lewis*, 47 Okla. Cr. 72, 288 Pac. 354, the validity of a sentence imposed by a justice of the peace in Oklahoma was assailed. The Court held that the sentence was valid and that procedure in the justice's court was distinguishable from that involved in the *Tumey* Case upon the ground *inter alia* that the right of appeal eliminated possible objections. The Court said:

> "In the *Tumey* case the defendant had no right or opportunity for retrial, and his right to appeal was confined to questions of law presented by a bill of exceptions to the appellate court. The question of whether there was any evidence upon which the conviction was based was particularly denied him. In the case at bar, the defendant had a right of appeal, first to the proper court of the county in which he was first tried, and thereafter to the criminal court of appeals to determine if he was legally convicted by competent evidence. Section 3000, C. O. S. 1921."

The defendant in *Brooks v. Town of Potomac*, 149 Va. 427, 141 S. E. 249, was convicted of a traffic violation in a mayor's court. The mayor received only half fees in case of acquittal, but the defendant had the right to appeal and secure a trial *de novo* in the circuit court. The Supreme Court of Appeals held that this procedure was according to due process of law. After discussing differences between conditions involved in the *Tumey* Case and those existing in Virginia, the Court said:

> "As already appears, none of these conditions existed in the instant case. Brooks was granted an appeal to the

circuit court for the asking, where, after waiving a trial by jury, his case was reheard *de novo* by an unbiased and disinterested judge, who weighed the evidence and applied the law to the facts, and rendered a decision in accordance therewith.

The *Tumey* case is not controlling here."

The Supreme Court of North Carolina in the case of *In The Matter of Eldon Steele*, 220 N. C. 685, which the petitioner seeks to have reviewed, recognized the authority of *Tumey v. Ohio*. However, it was found that the facts of this case and the procedure involved were so different from that condemned in Ohio that the *Tumey* Case was not in point. Chief Justice Stacy said at p. 688 (R. 17):

"The facts in the instant case are quite different from those appearing in the *Tumey Case, supra*. Here, the defendant, whithout any preliminary challenge, entered a plea of guilty. He did not demand a jury trial, as he might have done. C. S., 4627. Nor did he ask the justice of the peace to hold the balance 'nice, clear and true' between him and the State. Even so, he still had the right to appeal to the Superior Court of the county. *S v. Warren*, 113 N. C., 683, 18 S. E., 498. Had he entered a plea of not guilty, or if he did not feel justified in entering a plea of traverse, had he remained silent, he could have appealed from the judgment entered and the whole matter would have been heard in the Superior Court *de novo*. *S v. Koonce*, 108 N. C., 752, 12 S. E., 1032. 'In all cases of appeal,' from the sentence of the justice to the Superior Court of the county, 'the trial shall be anew, without prejudice from the former proceedings.' C. S., 4647. Those facts take the present case out of the doctrine announced in the *Tumey Case, supra*, and the authorities so hold. *Brooks v. Town of Potomac*, 149 Va., 427, 141 S. E., 249; *Tari v. State*, 117 Ohio St., 481, 159 N. E., 594, 57 A. L. R., 284, and cases cited."

## III

### THERE IS NO CONFLICT IN THE DECISIONS OF THE FEDERAL COURTS AS TO THE CONSTITUTIONALITY OF A TRIAL BEFORE A MAGISTRATE WHOSE FEES DEPEND UPON CONVICTION, WHEN THERE IS A RIGHT TO A TRIAL DE NOVO ON APPEAL.

It is suggested by petitioner that the petition for writ of *certiorari* ought to be allowed in order that a conflict in the decisions of the federal courts as to the effect of a right to a trial *de novo* on appeal from a judicial officer having a pecuniary interest in the disposition of the case before him may be resolved. Upon examination of the decisions of the federal courts, no such conflict will be found to exist.

In *Frank v. Mangum*, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. ed. 969, the United States Supreme Court held that the constitutionality of judicial procedure in the courts of a state must be determined by considering the system as a whole rather than piecemeal, that if a violation of due process is threatened by one agency of the State, but prevented by another agency of higher authority, there is no violation by the state. This decision is in accord with the decisions cited which hold that the right of trial *de novo* on appeal eliminates constitutional objections to procedure in magistrates' courts where the magistrates' fees depend upon conviction.

In *Bevan v. Krieger*, 289 U. S. 459, 53 Sup. Ct. 661, 77 L. ed. 1316, the Supreme Court was called upon to determine the validity of the restraint of a witness who, when subpoenaed to give a deposition, had refused to give testimony before a notary public in Ohio and had been imprisoned for contempt by the notary. It was contended that the proceedings amounted to a denial of due process because the notary had a pecuniary interest in compelling the witness to testify, the amount of his compensation for taking depositions depending upon the length of the testimony. The Ohio statutes, however, provided that a person committed for contempt might, upon application to a judge, have a complete judicial review of his commitment. The Supreme Court of the United

States held that, as commitment by the notary was subject to review and, therefore, lacked the finality of the judgment in the *Tumey* Case, there was no denial of due process.

*Ex Parte Meeks*, 20 F. (2d) 543 (W. D. Ky.), discussed *supra*, held that the right to a trial *de novo* upon appeal eliminated possible constitutional objections to procedure in an inferior criminal court in which the judge was alleged to have a pecuniary interest in convictions.

The petitioner cites the cases of *Ex Parte Baer*, 20 F. (2d) 912 (E. D. Ky.), and *Ex Parte Hatem*, 38 F. (2d) 226 (C. C. A. 6th), as being in conflict with the foregoing decisions. *Ex Parte Baer*, although concerned with Kentucky procedure as is *Ex Parte Meeks*, involved proceedings in the quarterly court of Fleming County, whereas the *Meeks* Case was concerned with proceedings in a county court. It did not appear that there was any right to a trial *de novo* on appeal from the quarterly court. Nor did it appear that there was a right to a trial *de novo* on appeal from the judgement complained of in *Ex parte Hatem*.

**Conclusion**

The petitioner, Eldon Steele, by pleading guilty has admitted the charge against him. Having been sentenced upon his own confession in open court, he is not now in a position to attack the constitutionality of the procedure for determining questions of fact in the courts of Richmond County, North Carolina. Even if he had not pleaded guilty, the clear import of the decisions of the United States Supreme Court, the lower federal courts, and the State courts is that, by virtue of the right to a trial *de novo* on appeal and other statutory safe-guards, procedure such as that before justices of the peace in Richmond County is not violative of due

process. The writ of *certiorari*, therefore, should not be allowed.

Respectfully submitted,

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T. W. BRUTON,
*Assistant Attorney General.*

GEORGE B. PATTON,
*Asssitant Attorney General.*

*Counsel for State of North Carolina, Respondent.*

## APPENDIX

CONSTITUTION OF NORTH CAROLINA, Article IV, Section 27:

"The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions, founded on contract, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. And the General Assembly may give to the justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars. When an issue of fact shall be joined before a justice, on demand of either party thereto he shall cause a jury of six men to be summoned, who shall try the same. The party against whom the judgment shall be rendered in any civil action may appeal to the Superior Court from the same. In all cases of a criminal nature the party against whom the judgement is given may appeal to the Superior Court, where the matter shall be heard anew. In all cases brought before a justice, he shall make a record of the proceedings, and file the same with the clerk of the Superior Court for his county."

N. C. CODE ANNOTATED (Michie, 1939), Section 4627: "TRIAL BY JURY, IF DEMANDED.—If either the complainant or the accused shall ask for it, the justice shall allow a trial by jury, as is provided in civil actions before justices of the peace."

N. C. CODE ANNOTATED (Michie, 1939), Section 4647: "APPEAL FROM JUSTICE, TRIAL DE NOVO.—The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor

and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings."

## INDEX



## AUTHORITIES CITED

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1941

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## No. 1118

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ELDON STEELE, Petitioner,

vs.

THE STATE OF NORTH CAROLINA, Respondent

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**BRIEF OF PETITIONER IN REPLY TO BRIEF OF THE RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.**

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ARGUMENT

I.

THE CONSTITUTIONALITY OF THE PROCEDURE FOR DETERMINING THE GUILT OR INNOCENCE OF DEFENDANTS IN COURTS OF JUSTICES OF THE PEACE IN RICHMOND COUNTY IS NOT A MOOT QUESTION BECAUSE OF PETITIONER'S PLEA OF GUILTY.

To say that petitioner's plea of guilty makes the constitutionality of the procedure under which he is tried a moot question presupposes that the statutes [set out in full in the

Appendix of this brief] giving the Justices of the Peace of Richmond County a "direct, substantial pecuniary interest"[1] in convicting defendants do not deprive Justices of the Peace of jurisdiction to try criminal cases, for even the Supreme Court of North Carolina holds that jurisdiction can not be conferred by consent[2] and that lack of jurisdiction can not be waived.[3] It also assumes that a plea of guilty is a waiver of the constitutional right to be tried and sentenced by a fair and impartial judge. Yet the Tenth Circuit Court of Appeals in the case of *McCleary v. Hudspeth*, 124 F (2d) 445 (Dec. 24, 1941) held that a plea of guilty is not a waiver of the right to counsel and that such plea and the judgment and sentence thereon are void and may be attacked by writ of *habeas corpus*.

Though ordinarily a plea of guilty is a confession of guilt, that this is not always true is recognized by *Walker v. Johnson*, 312 U. S. 275, *Smith v. O'Grady*, 312 U. S. 329, *McCleary v. Hudspeth, supra*, and *State v. Branner*, 149 N. C. 559, 561, 63 S. E. 169. In the Branner Case, it was said that a plea of guilty may be changed to a plea of not guilty in the discretion of the court, and this is still law in North Carolina.

As a practical matter, the cheapest thing that a man charged with a crime in a court of a Justice of the Peace in Richmond County may do is to plead guilty. By pleading guilty, Eldon Steele saved having a witness fee charged against him in the instant case. (R. 8.) Every man who knows that a magistrate must convict so many head a month or go bankrupt"[4] will be tempted to plead guilty, whether guilty or not, rather than to have to pay the additional costs entailed by a trial or be put to the "delay, an-

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[1] *Tumey v. Ohio*, 273 U. S. 210, 47 S. Ct. 437, 67 L. ed. 969.

[2] *MacRae & Co. v. Shaw*, 220 N. C. 516, 17 S. E. (2d) 664.

[3] *Miller v. Roberts*, 212 N. C. 126, 193 S. E. 286.

[4] Note on *In Re Steele*, 220 N. C. 685, 18 S. E. (2d) 132, (the instant case) in 20 N. C. L. Rev. 304, 311.

noyance and expense of an appeal."[5] This fact alone should be enough to deprive the Justices of the Peace of Richmond County of jurisdiction to accept a plea of guilty in a criminal action.

Finally, even if the plea of guilty be considered a confession of guilt, the magistrate must still enter a judgment. But, if the prisoner is unable to pay the costs, the only way in which a magistrate is able to get any pay for his services is to sentence the defendant to jail to be assigned to work on the roads. N. C. Pub.-Loc. Laws of 1933, Chap. 342, Sec. 2 (a). And under the provisions of the North Carolina Code of 1939 (Michie), Sec. 3846 (25), no person may be committed to the roads for a term of less than thirty days. Therefore, to be entitled to collect costs from the county for the trial of a defendant who is unable to pay the costs, the magistrate must give a sentence of at least thirty days. The offense for which Eldon Steele was sentenced carries a punishment of a fine of *not more than* fifty dollars ($50.00), or imprisonment for *not more than* thirty days. N. C. Code of 1939 (Michie), Sec. 4457 (a) and 4458. Thus, in the instant case, the magistrate might have imposed a fine of from one cent (1c) to fifty dollars ($50.00) or imprisonment for from one day to thirty days. Since the petitioner was unable to pay a fine, or even the costs, the magistrate could receive compensation for the trial of petitioner *only* by sentencing him to the *maximum* term of thirty days. Therefore, the magistrate had a "direct, substantial, pecuniary interest"[6] in sentencing petitioner to the maximum term provided by law.

Under the provisions of Sec. 1481 of the N. C. Code of 1939 (Michie), a magistrate in North Carolina may try only cases involving offenses the punishment for which does not exceed a fine of fifty dollars ($50.00) or imprisonment for thirty days. The fact that the magistrate in the

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[5] *Williams v. Brannen*, 116 W. Va. 1, 178 S. E. 67.

[6] *Tumey v. Ohio, supra.*

instant case imposed the longest prison term in his power —one just long enough to insure the collection of his fee from the County—and suspended it on condition that the defendant pay the costs without any fine, is rather conclusive proof that he imposed the maximum sentence only to insure the collection of his fee.

## CONCLUSION

The magistrate in the instant case had a "direct, substantial, pecuniary interest"[6] not only in finding petitioner guilty, or having him plead guilty, but also in imposing upon him the maximum sentence allowed by law. Surely such a procedure deprived petitioner of his liberty without due process of law.

Respectfully submitted,

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THOMAS L. PARSONS,
GEORGE S. STEELE, JR.,
*Counsel for Petitioner.*

## ADDENDUM

On page 15 of their brief counsel for respondent say that "it did not appear that there was any right to a trial *de novo* on appeal from the Quarterly Court" in the case of *Ex parte Baer*, 20 Fed. 2nd 912 (Ky.), cited by petitioner in his original brief, "nor did it appear that there was a right to a trial *de novo* on appeal from the judgment complained of in *Ex parte Hatem*," 38 Fed. 2nd 226 (Ohio). At least as to Kentucky, however, counsel for respondent are incorrect in this assumption for the statutes of Kentucky (Section 336 of the Criminal Code) provide, as to appeals from Quarterly Courts to Circuit Courts, that

[6] *Tumey v. Ohio, supra.*

"upon the appeal the case shall be tried anew as if no judgment had been rendered * * * *." In the limited time at our disposal we have been unable to ascertain what the statutes of Ohio provide as to trials *de novo*, but since it is well-nigh the universal custom to try anew cases appealed from inferior courts it is doubtless safe to assume that this is the procedure in Ohio.

## APPENDIX

North Carolina Public-Local Laws of 1933, Chapter 342:

"AN ACT TO REGULATE THE COSTS IN CRIMINAL ACTIONS IN COURTS OF JUSTICES OF THE PEACE FOR RICHMOND COUNTY.

"*The General Assembly of North Carolina do enact:*

"SECTION 1. That upon conviction of any person in a Justice of the Peace or Mayor's Court in Richmond County there shall be taxed against the defendant the following costs and no more:

"(a) A process fee of two dollars and fifty cents ($2.50) for the use and benefit of the officer making the arrests and serving all processes.

"(b) A fee of two dollars ($2.00) for the use and benefit of the trial justice or Mayor; *Provided*, that in cases of removal from one Justice to another the said amount shall be prorated between them.

"(c) For each witness offered by the State, not to exceed two, fifty cents (50c), and for each witness subpoenaed by the defendant, a fee of fifty cents (50c).

"(d) Jail fees at the rate fixed by the County Commissioners, but not to exceed the sum of seventy-five cents (75c) per day.

"SEC. 2. (a) If the defendant is sentenced to jail to be assigned to the roads for non-payment of the costs, the

County shall pay one-half the fees hereinbefore set forth to the Mayor or Justice of the Peace and officer serving the processes; *Provided*, that the County shall not be liable for or pay to any Justice of the Peace or Mayor a sum in excess of ten dollars ($10.00) per month for cases in which he has final jurisdiction.

"(b) That upon appeal by the defendant from the justice's court or mayor's court to a higher court, or if the defendant be bound over to any higher court for trial, such costs as hereinbefore provided shall be charged upon the warrant, and if paid shall accrue to the use and benefit of the persons entitled thereto, and if the defendant do not pay the costs, the County shall pay one-half the costs assessed by such Justice of the Peace or Mayor to the persons entitled to the same; *Provided*, that the county shall not be liable for witness and mileage fees of witnesses for the defendant.

"SEC. 3. That if any Justice of the Peace or Mayor or other officer shall collect any fees other than set forth herein or in excess of the sums set forth herein, he shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court.

"SEC. 4. That all laws and clauses of laws in conflict herewith be and the same are hereby repealed.

"SEC. 5. That this act shall be and remain in full force and effect from and after June first, nineteen hundred and thirty-three.

"Ratified this the 18th day of April, A.D., 1933."

North Carolina Public-Local Laws of 1935, Chapter 358:

"AN ACT TO AMEND CHAPTER THREE HUNDRED FORTY-TWO OF PUBLIC-LOCAL LAWS OF ONE THOUSAND NINE HUNDRED AND THIRTY-THREE RELATING TO THE COST IN CRIMINAL ACTION IN THE COURTS OF THE JUSTICE OF THE PEACE IN RICHMOND COUNTY.

"*The General Assembly of North Carolina do enact:*

"SECTION 1. That Chapter three hundred and forty-two of Public-Local Laws of one thousand nine hundred and thirty-three be and the same is hereby amended as follows:

"Strike out the *proviso* in subsection A of Section two and insert in lieu thereof the following: '*Provided,* that the County shall not be liable for or pay to any Justice of the Peace or Mayor a sum in excess of five dollars per month for cases in which he has final jurisdiction: *Provided further,* That the County shall not be liable for nor pay to any lawful officer any sum in excess of fifteen dollars per month for cases in which such officer was the actual arresting officer.'

"SEC. 2. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

"SEC. 3. This act shall be in full force and effect from and after its ratification.

"Ratified this the 24th day of April, A.D., 1935."